Carter & Sons Freightways, Inc. *and* International Brotherhood of Teamsters, Local Union No. 795, AFL–CIO. Case 17–CA–19247

March 12, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On October 17, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel also filed a brief in support of the judge's decision, a brief in answer to the Respondent's exceptions, and a motion for expedited processing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The General Counsel has excepted to the judge's finding that the Respondent's monthly operating revenue from its Wichita, Kansas operation increased by $7300 in July 1997, the first full month following the unlawful closure of the terminal and conversion to an agency operation. We find merit to this exception.

At the hearing, the Respondent introduced evidence comparing the revenue and expenses for its Wichita operations before and after the closure of the terminal. According to the Respondent, these figures showed that operating income (gross revenue minus operating expenses and commissions paid) increased from an average of $86,763 per month as a company-owned terminal, to $95,684 in July 1997, as an agency operation. However, the Respondent arbitrarily stated gross revenue for July 1997 as $141,988.[3] The actual gross revenue for July 1997, the first full month after the closure, was $133,500.

In addition, the Respondent's calculations under its agency operation do not include continuing expenses for rent of the Wichita terminal facility. The Respondent stated at the hearing that it continues to pay rent on the closed Wichita terminal facility at a rate of $1600 per month. This expense was included in the Respondent's calculation of operating expenses prior to the closure, but was arbitrarily omitted from the Respondent's calculation of postclosure operating expenses. In agreement with the judge, we find that the continuing expense for rent should be included in the calculation of postclosure expenses.

In light of the foregoing, we find that the Respondent has not shown that its operating income increased following the closure of the Wichita terminal. To the contrary, using the actual figures for gross revenue in July 1997, and adding the ongoing terminal lease payment back into Respondent's own figures for July 1997 operating expenses, establishes that the Respondent's monthly operating income decreased by $1167 in July 1997, following the closure and subcontracting. Accordingly, for these reasons and those stated by the judge, we find that the Respondent has not shown that restoration of the Wichita terminal would be unduly burdensome.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carter & Sons Freightways, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified:

1. Substitute the following for paragraph 1(b):

''(b) Coercively interrogating employees about their union activities or union sympathies.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The judge inadvertently indicated in his decision at sec.II,B,3, par. 4, and at the remedy section, par. 4 that the Respondent renewed the lease for its Wichita terminal in May 1997, a month before it closed the terminal; as reflected elsewhere in the judge's decision the correct date is March 28, 1997. This inadvertent error does not affect our decision or our agreement with the judge's analysis of the restoration remedy.

In adopting the judge's finding that the Respondent coercively interrogated employees in violation of Sec. 8(a)(1), Member Brame relies additionally on the fact that the questions concerning employees' union activities were accompanied by threats of termination and closure of the terminal.

Member Brame agrees that a bargaining order is appropriate in the circumstances of this case. In Member Brame's view, any bargaining order must be closely reviewed because it necessarily denies employees the opportunity to vote in a secret-ballot election after hearing the positions of the employer and the union concerning representation. In adopting the judge's recommendation that a bargaining order issue in this case, Member Brame relies additionally on the fact that the Respondent has not challenged the majority status of the Union in its exceptions but instead has stated in its brief that it is willing to recognize and bargain with the Union (albeit solely with respect to the effects of its decision to close the Wichita terminal and subcontract the work).

[2] We shall modify the judge's notice to correct inadvertent errors and to more closely reflect the violations found.

[3] The record shows that $141,988 was the monthly average gross revenue for the Wichita operations for the year ending May 31, 1997. Thus, the Respondent assumed that gross revenues remained the same before and after the closure when, in fact, they declined.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To chose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with closing our terminal, discharge, or other reprisals for engaging in union activities.

WE WILL NOT coercively interrogate you about your union activities or union sympathies.

WE WILL NOT close our Wichita terminal, subcontract the work, discharge or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local Union No. 795, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Edward Newman, Glen Tucker, Steve Hoelscher, and William Casselman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL restore our Wichita, Kansas facility to its operation as it existed on June 16, 1997, unless we can show in compliance proceedings, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that those actions would be unduly burdensome.

WE WILL make Edward Newman, Glen Tucker, Steve Hoelscher, and William Casselman whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharges of Edward Newman, Glen Tucker, Steve Hoelscher, and William Casselman and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, recognize and bargain with International Brotherhood of Teamsters, Local Union No. 795, AFL–CIO and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time city pickup and delivery drivers and road drivers employed by Carter & Sons Freightways at its facility located in Wichita, Kansas, excluding office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

CARTER & SONS FREIGHTWAYS, INC.

Constance N. Traylor, Esq., for the General Counsel.
David Curtis, Esq. and *Patrick S. Richter, Esq.*, of Dallas, Texas, for the Respondent.
Charles H. Peaster, Business Agent, of Wichita, Kansas, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Wichita, Kansas, on August 27 and 28, 1997.[1] On June 23, International Brotherhood of Teamsters, Local Union No. 795, AFL–CIO (the Union) filed the charge alleging that Carter & Sons Freightways, Inc. (Respondent) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The charge was amended on July 18 and 24. On July 24, the Regional Director for Region 17 of the National Labor Relations Board issued a complaint and notice of Hearing against Respondent alleging that Respondent violated Section 8(a)(3) and (1) of the Act. The complaint was amended on July 25 and again at the hearing. Respondent filed timely answers to the complaints, denying all wrongdoing.[2]

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[3] and having considered the posthearing briefs of the parties, I make the following

[1] Unless otherwise stated, all dates hereafter are in 1997.

[2] On August 14, 1997, the acting Regional Director filed a petition in Civil No. 97–1344–FGT in the United States District Court, District of Kansas, seeking an injunction under Sec. 10(j) of the Act. A decision has not yet been issued.

[3] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Texas corporation with an office and principal place of business located in Carrolton, Texas, where it is engaged in the interstate transportation of goods and freight, with various terminals located throughout the United States.[4] This case involves Respondent's Wichita, Kansas terminal. Annually, Respondent derives gross revenues from the transportation of goods and freight from the State of Texas to points outside Texas. Further, Respondent annually derives gross revenues in excess of $50,000 from the transportation of goods and freight from the State of Kansas to points outside Kansas. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

In June, the Union began its organizing campaign with the employees working at Respondent's Wichita, Kansas terminal. On June 12, Charles Peaster, business agent, met with Edward Newman, Steve Hoelscher, and William Casselman (three of Respondent's four local drivers).[5] The three employees signed union authorization cards that day. Glen Tucker, the fourth local driver, signed an authorization card on June 13. On June 17, the Union filed a representational petition with the Board in Case 17–RC–11501. A copy of the petition was successfully sent by facsimile to Respondent prior to noon on June 18.

The complaint alleges that as an immediate reaction to the petition, Respondent through its agents threatened and interrogated employees in order to dissuade employees from supporting the Union. Most important, the complaint alleges that Respondent closed its Wichita terminal, subcontracted its delivery work and terminated its four local drivers because of the employees' union activities. As a remedy, the General Counsel seeks an order requiring Respondent to recognize and bargain with the Union and an order requiring Respondent to reestablish operation of its Wichita terminal.

The Respondent denies that it violated the Act. Further, Respondent contends that it closed its Wichita facility and subcontracted the work without regard to any union activities. Respondent argues that, even if violations of the Act are found, only a traditional remedy is necessary. Finally, Respondent argues that restoration of its Wichita facility would be unduly burdensome.

B. *Facts*

1. The representation campaign

As stated earlier, the Union had signed union authorization cards from four of Respondent's five employees by June 13. A copy of the representation petition was received by Respondent on the morning of Wednesday, June 18. Respondent's terminal manager, Jerry Milam, notified Ron Carter, Respondent's president and chief executive officer, of the petition that same day. Carter discussed the petition with Fred Churchill, senior vice president and Mike Dyer, vice president, prior to Churchill's and Dyer's visit to the Wichita terminal on June 19.

Edward Newman, a local pickup and delivery driver, testified, without contradiction, that on June 16, Milam approached him and asked what the drivers had done. Newman asked Milam what he meant and Milam responded that he meant ''with the Union.'' Newman told Milam that the employees were seeking union representation and asked how Milam found out about the employees' activities. Milam replied that he learned through a customer. Milam told Newman that Ron Carter, Respondent's president and CEO, would never let the employees be represented by a third party. Milam said that the employees had made a big mistake and that if the employees continued to pursue union representation, there was a possibility that the terminal would be closed.

On June 19, Churchill and Dyer spoke with the four local drivers at Respondent's Wichita facility. Newman, testified that Churchill told the employees that there was a big problem and that the purpose of the meeting was to discuss what to do about it. According to Newman, Churchill stated that he was going to be frank with the employees. Churchill said that if the employees continued with unionization, the terminal would be shut down. Churchill asked the employees to tell him about their concerns. Newman answered that the employees were concerned about wages, benefits, seniority, and safety. Churchill discussed each of these concerns separately. Churchill stated that he was only a messenger and that he would take notes and he and Dyer would discuss these matters with Carter, Respondent's CEO. According to Newman, during the discussion of seniority, and its effect on the choice of driving routes, Churchill stated that the employees could be losing all seniority if they kept pursuing the Union. If the employees did not pull their union cards, Carter would shut down the terminal for financial reasons. After a question from Newman about what had happened at Respondent's Kansas City terminal, Churchill stated that Carter himself had told the Kansas City employees that if they did not pull their union cards, he would close the terminal. The employees withdrew their support of the Union and the terminal did not close. Churchill added that if Carter was willing to close the Kansas City terminal, he would not hesitate to close Wichita, a much smaller operation. Newman also raised a question concerning unfavorable job evaluations given to him and Hoelscher. Dyer stated that the two employees would be reevaluated in 30 or 60 days.

Newman's version of the June 19 meeting was substantially corroborated by the testimony of Steve Hoelscher, Glen Tucker, and William Casselman, the other employees present at the meeting. I found Newman's testimony to be the most complete and reliable of the witnesses testifying as to what occurred at the June 19 meeting and I make my findings based on his testimony.

Churchill, on the other hand, denied that he made any promises at the June 19 meeting. When asked whether he made any threats, Churchill testified, ''I thought it was the

[4] Respondent began operations as Eagle Freightways, Inc., in March 1995. The name was changed to Carter & Sons Freightways, Inc., in August 1996.

[5] Respondent employed five drivers at its Wichita terminal; four local delivery drivers and one over-the-road driver.

most amicable meeting I'd ever sat in on.'' Churchill testified that after Newman asked about authorization cards at Respondent's Kansas City facility, he responded that he had heard that there were authorization cards but that he had never seen them. He told Newman that when employees had asked for help in retrieving their cards from the local union, he had told that he could not withdraw cards for employees and that the employees would have to write their own letters to the Union.

I did not find Churchill or Dyer to be credible witnesses. They did not truthfully testify to the facts surrounding Respondent's closure of the facility and did not attempt to truthfully testify as to what occurred at the June 19 meeting. Accordingly, I credit the testimony of Newman and the other employees over the testimony offered by Churchill and Dyer.

Immediately after the meeting with all four local drivers, Churchill and Dyer met privately with Newman. Churchill told Newman that he had heard that Newman had been the employee responsible for getting the union thing started. Churchill said that the choice was going to be Newman's and that Churchill wanted to know whether Newman ''was going to be a man and back down'' or was going to pursue the matter and ''cost everybody their job.'' Newman answered that he had to discuss the situation with the other employees. Newman then spoke with the other three local drivers. Hoelscher, Casselman, and Newman decided to continue the union organizing effort. Tucker, afraid of losing his job, asked to have his authorization card returned.

On the morning of Friday, June 20, Newman spoke with Jerry Milam, terminal manager of the Wichita facility.[6] Milam asked Newman what the employees had decided. Newman responded that he would have to talk to the other drivers again. Newman spoke to the other drivers and then asked Milam if he could go to the union hall and discuss the matter with the union business agent. Milam gave Newman permission to visit the union hall during his lunchbreak.

That afternoon, Newman went to Milam's office and asked if he could meet with Churchill and Dyer. Milam told Newman that Churchill and Dyer had left for Carrolton, Texas. Newman then asked if he could speak by telephone with Ron Carter, Respondent's president. Milam told Newman that the employee could just report the drivers' decision to him. Newman reported that the employees had decided to continue to seek union representation. Milam told Newman that the employees had made a big mistake and that ''this might cost our jobs.'' Milam ordered Newman back to work. This conversation was overheard by Hoelscher.

On Monday, June 23, Newman, Hoelscher, and Casselman arrived at work together. Tucker arrived shortly thereafter. When the employees reported for work, Churchill told the drivers that the terminal had been shut down and that the employees were no longer needed. The employees were ordered to return their company pagers and uniforms and were given their personal items which had already been removed from the company trucks. Churchill said to Newman, ''[I] hope it was worth it.''

[6] Milam, presently employed by Respondent as a sales manager, did not testify at the hearing. Respondent offered no explanation for its failure to call Milam as a witness.

2. The closing of the terminal and the subcontracting of the work

Since June 23, all local pickup and delivery work previously performed by Respondent's four local drivers, employed at the Wichita terminal, has been performed by Professional Cargo Services (PCS). Duane Zogleman, owner of PCS, testified that PCS is engaged in the intrastate transportation of freight, primarily in western Kansas. Since December 1995, PCS and Respondent have been party to a ''Interline Cartage Agreement'' by which PCS delivered cargo to destinations in Kansas not serviced by Respondent. Before, June 20, PCS picked up this cargo at Respondent's Wichita terminal using PCS tractors and trailers.

Zogleman testified that during the week of June 16, he received a telephone call from Churchill in which Churchill asked whether PCS would be willing and able to take on additional business from Respondent. Zogleman spoke with Churchill and Dyer several times that week. On June 20, Churchill and Dyer visited Zogleman at PCS's terminal. Churchill told Zogleman that Respondent was going to close down its Wichita terminal and that he wanted to know whether PCS was interested in subcontracting Respondent's local cartage. Churchill informed Zogleman of Respondent's intention to dismiss its employees. Zogleman further testified, that Debra Devlin, then Respondent's operations manager at the Wichita terminal,[7] told him that the reason for terminating the employees was ''labor problems.''

Later that same day, Churchill and Zogleman executed an agreement whereby PCS performs local cartage work for Respondent on a commission basis. The customers are billed by Respondent as was done when Respondent's terminal was open. PCS drivers use PCS trucks to deliver the freight. However, Respondent's trailers are often used. Respondent had a telephone installed at PCS's offices and Milam maintains a desk there. Respondent also moved a facsimile machine, computer, printer, calculator, and file cabinet to Milam's office space at PCS. Darryl Gulledge, Respondent's over-the-road driver,[8] continues to drive for Respondent but from PCS's terminal. Gulledge drives each evening from PCS's terminal to Respondent's Kansas City terminal. Zogleman testified that he did not have to hire additional employees to perform the local cartage work subcontracted to him by Respondent. Further, Zogleman testified that the agreement with Respondent was not unusual and that he had similar agreements with three other interstate carriers in the past.

On June 18, Milam called Colin O'Neal, operations manager for Pro Drivers, a temporary agency for truckdrivers in the Wichita area. Prior to June, Pro Drivers had occasionally provided temporary drivers to Respondent. On June 18, after the petition was filed, Milam called O'Neal and asked whether O'Neal could provide Respondent with four drivers on Monday, June 23. O'Neal asked whether Milam was going to ''fire everybody.'' Milam answered that he couldn't

[7] Devlin, on maternity leave at the time of the hearing, did not testify. While Devlin is still carried on Respondent's payroll as an employee, Respondent's witnesses testified that there is no job for her to return to in Wichita.

[8] Gulledge was the only driver employed at the Wichita facility who was not involved in the organizing effort.

make any comment. O'Neal told Milam to call back later when Milam knew exactly what his manpower needs were.

On Friday, June 20, Milam called O'Neal and requested two drivers to report to the PCS facility on Monday morning. Milam told O'Neal that Respondent was moving its operations to the PCS dock and that Debra Devlin, dispatcher and operations manager, would have regular hours at the PCS dock. Milam would also have an office at PCS. For the first 3 weeks after Respondent subcontracted its work to PCS, Pro Drivers provided one or two drivers to Respondent. These drivers worked under the supervision of PCS but Respondent, not PCS, paid Pro Drivers for their services.

On June 18 or 19, Mike Dixon, director of transportation for the Coleman Company, called Milam to inform Milam of the Coleman Company's expected large shipments for the last week in June. Respondent has been making pickups and deliveries from the Coleman facilities in Wichita since March 1996. Milam told Dixon that Respondent was ''having some turmoil.'' Milam explained that the turmoil involved the termination of some drivers involved in an organization petition. Milam requested that Dixon use other carriers until the terminal could be

On June 20, Milam called Dixon and told him that Churchill would be in town the following week. Milam and Dixon scheduled an appointment for Dixon and Churchill to meet on June 25. At the meeting, Dixon told Churchill that he wanted assurances that Respondent would continue its discounts and guarantees. Churchill confirmed that Respondent would continue its standard carrier codes, that Respondent's bills of lading would be used and that Coleman would continue to file all loss and damage claims with Respondent. Churchill assured Dixon that ''for all intents and purposes, [Respondent] would still be the ongoing entity'' that Coleman would be doing business with. Churchill maintained that PCS would be making pickups at Coleman as an agent of Respondent. Either Milam or Churchill told Dixon that Milam would work out of an office at PCS.

During the week of June 23, Milam visited Respondent's customers in an effort to reassure the customers that the change in Respondent's operation would not adversely affect service. Andrea Stras, a vice president for Kamen Wiping Services, testified that her company had been shipping goods with Respondent since September 1995. During the week of June 23, Milam, a friend of Stras' for approximately 15 years, told Stras that there would be changes at the terminal but that Stras and her company would not feel any effect of the changes. Milam said that Respondent was going to close its terminal and have PCS pick up cargo for Respondent. Milam explained that Respondent's name would still be on the bills of lading and that there would be no other changes. Milam told Stras that Respondent was going to fire all or had fired all the drivers because the drivers wanted union representation. Milam referred to the drivers wanting third party representation. Milam told Stras that Ron Carter did things his own way and that Carter was not going to allow a union to come into Respondent's business. Milam told Stras that both Respondent's office and the PCS office would be used until Respondent's computer could be moved to the PCS facility. Stras did not want her company's freight to be handled by PCS. Further, Stras was offended by the dismissal of the drivers because they had sought union representation.

Milam visited Stras again a week later with Churchill. Churchill assured Stras that Respondent's business was running smoothly after the close of the terminal. Churchill told Stras that Respondent would bill for all shipments and that her previous discounts and guarantees would apply.

Debbie Helton, shipping supervisor for Universal Products in Goddard, Kansas, testified that on June 23, she noticed that employees of PCS began picking up freight from Universal's shipping dock. Universal had been shipping with Respondent since 1995. Prior to June 23, Newman made the pickups at Universal's dock for Respondent. In late June, Milam called Helton and told her that Respondent had closed its Wichita terminal. Milam said that everything would continue as it had in the past except that PCS would be picking up cargo for Respondent. When Helton asked why the terminal had been closed, Milam answered, ''[T]hat there was a third party involved.'' According to Helton, Milam continued to refer to a third party. I draw the inference that the ''third party'' was the Union.

3. Respondent's defense

Respondent contends that the closing of its Wichita terminal and the subcontracting of the work were for legitimate, nondiscriminatory, business reasons.

Mike Dyer, vice president, testified that Devlin, the dispatcher and operations manager, and Milam, the terminal manager, never got along. Devlin and Milam had different ideas about how the terminal should be run and Devlin continually complained to Dyer about Milam. Dyer testified that there were problems with management going back as far as December 1995. Dyer further testified that these problems continued until the terminal was finally closed in June 1997. However, in February 1997, Dyer evaluated the Wichita terminal for Respondent and stated, ''I found your operation to be in very satisfactory condition. Your personnel are hard working and polite and your facility, office and yard are very well kept.''

Ron Carter, president and CEO, also testified that he was dissatisfied with Milam's management since 1995. Although Carter and Respondent's other witnesses testified as to poor management at the Wichita facility, Milam, the manager, was retained. Milam was given a raise in late May which was personally approved by Carter. Most important, Respondent retained Milam after its terminal was closed.

Carter further testified that he was concerned over the high rate of turnover for drivers. According to Carter, turnover was worse at Wichita than at any of Respondent's other facilities. Carter also testified that he was concerned that the Wichita facility had the lowest revenues of any of Respondent's facilities. Almost all of Respondent's terminals were operating at a net loss. Nine of these facilities were losing greater amounts than the Wichita terminal. However, being the smallest facility, the Wichita terminal produced the lowest gross revenue. Carter did not explain why Respondent exercised an option to renew its lease for the Wichita facility in late May. Moreover, Carter had personally approved a raise for Milam in late May.

Carter testified that the ''last straw'' was the receipt of two job evaluations from the Wichita terminal on June 14. Milam had performed job evaluations for employees Edward Newman and Steve Hoelscher. Although Milam had rated these employees average or below average in nearly every

category, Milam recommended that the employees receive raises. Dyer had approved Milam's recommendations and had forwarded them to Carter. On June 14, Carter read these evaluations and was displeased. Carter wrote on each appraisals that the employee's 90-day probationary period should be extended, ''till improve.'' According to Carter, after reading these appraisals he decided to close the Wichita terminal and that he so informed Churchill and Dyer on June 16. Carter did not explain the inconsistency of extending the probationary period of two Wichita employees and immediately closing the facility at which they worked.

On Monday June 16, Carter met with Churchill and Dyer. According to Carter he told Churchill and Dyer to close the Wichita facility. Thus, Respondent argues that the decision was made prior to any knowledge of the employees' union activities. However, Respondent did not inform its district managers and department heads of this decision until June 23.

Mike O'Brien, a certified public accountant, testified as an expert witness for Respondent. O'Brien was asked to review Respondent's financial records and determine the financial impact of the change from a company terminal to a agency operation. O'Brien testified that as a result of the change to an agent-run facility, Respondent could expect to save almost $30,000 per month in operating expenses. Commissions paid to PCS would reduce that figure so that the net increase in operating income would be $8900 per month. For the fiscal year ending May 31, 1997, the Wichita terminal showed a loss of $9500 before taxes. O'Brien did not account for Respondent's continuing obligation under its lease. Even subtracting the rent due under the lease, Respondent's net operating income was $7300 per month better under an agent-run operation. O'Brien's report was not submitted to Respondent until two weeks prior to the hearing. His opinion and report were not utilized by Respondent in making its decision to close the facility.

At the time of the hearing, Respondent had entered into a contract with a real estate broker to sublease the facility, but no such lease or sublease had been entered into. No capital improvements have been made to the property. Respondent's equipment was moved to PCS's facility or other facilities operated by Respondent.

C. *Analysis and Conclusions*

1. The closing of the terminal and the discharge of the employees

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that General Counsel has made a strong showing that Respondent was motivated by antiunion considerations in terminating the employment of its four local pickup and delivery drivers and closing its Wichita terminal.

The same date that the petition was filed, Milam called Colin O'Neal of Pro Drivers and asked whether O'Neal could provide Respondent with four drivers on Monday, June 23. O'Neal asked whether Milam was going to ''fire everybody.'' Milam answered that he couldn't make any comment.

On June 19, the day after the petition was filed, Churchill and Dyer visited the Wichita terminal. Churchill told the employees that if they continued with their union organizing, the terminal would be shut down. Churchill asked to hear the employees' problems and concerns, an unlikely scenario if a decision had already been made to close the facility. Churchill told the employees that if they didn't pull their union cards, the terminal would be shut down. However, he just as clearly stated that if the cards were withdrawn, the employees could continue to work without any repercussions. After a question from Newman, Churchill said that Carter had personally threatened to close the Kansas City facility unless the employees withdrew their cards and that the employees had done so. He then pointed out that if Carter would close Kansas City to avoid a union, he would certainly close Wichita, a much less important facility. The implication again being that if the employees withdrew their union cards they could continue working.

After the employee meeting, Churchill asked Newman, the suspected union leader, whether he was going to back down or cost everybody their jobs. On June 20, Newman reported to Milam that the employees would continue to pursue union representation and Milam replied that the employees had made a big mistake that might their mean jobs.'' Respondent entered into a contract with PCS and began moving equipment out of the terminal that night. On June 23, Churchill said to Newman, ''I hope it was worth it.'' Threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees. *Milgo Industrial*, 202 NLRB 1196 , 1200 (1973), enfd. mem. 497 919 (2d Cir. 1974). An inference may be drawn from the animus behind such threats, which the discharges would gratify, that the animus was the true reason for the discharges. *General Thermo, Inc.*, 250 NLRB 1260, 1261 (1980); *Best Products Co.*, 236 NLRB 1024, 1026 (1978). Loss of employment, frequently referred to as the ''capital punishment'' of the workplace, has been long recognized as the type of action which would demonstrate most sharply the power of the employer over its employees. *White Plains Lincoln Mercury*, 288 NLRB 1133, 1139 (1988).

Further, adding to the massive evidence of antiunion motivation are the undenied admissions of Respondent's terminal manager. Milam admitted to Andrea Stras that Respondent had terminated the drivers because the drivers wanted third party representation. Milam told Stras that Carter would not allow a union into his company. Milam told Mike Dixon that

the drivers were terminated because they were involved in an organization petition. Milam also told Debbie Helton that the terminal was closed because of a third party.

Based on the company knowledge of the employees' union activities, Respondent's swift action in response to the petition, the animus expressed against the Union, the threats to close the facility, the timing of the discharges, and the admissions to Respondent's customers, I find that General Counsel has established a very convincing prima facie case of discrimination.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. Here, General Counsel's strong prime facie case makes Respondent's burden substantial. See *Eddylean Chocolate Co.*, 301 NLRB 887 (1991); *Federal Screw Works*, 310 NLRB 1131, 1140 (1993). I find Respondent's defense less than convincing. There was simply no compelling financial development that explains a June 14 or June 20 decision to close the terminal. While Respondent's witnesses testified to problems at the Wichita facility dating back to December 1995, those problems seem to have been resolved by February 1997. Dyer wrote an evaluation in which he commended the facility. In late March, Respondent exercised an option to renew its lease for another 2 years.

The problems attributed to the facility were admittedly problems with management. In late May, Carter gave the terminal's manager, Milam, a raise in salary. Such action is more consistent with Dyer's evaluation of the facility as being in very satisfactory condition than Carter's testimony that the terminal was a ''headache.'' Moreover, Milam was retained when the facility was closed. The supposed ''last straw,'' the appraisals of Newman and Hoelscher, were mistakes of management. Milam had rated these employees below average in important specific categories but had rated them average overall and had recommended them for raises. Dyer, a vice president, had approved Milam's mistakes. This does not appear to be a reason to close the facility without any prior planning. Carter's written comment, that the employees' probationary period be extended, is inconsistent with a decision to close the facility. If Carter had decided to close the facility, he would not have extended the probationary period, ''till improvement,'' for these employees. The employees could not improve because they would no longer be working.

Further, Respondent has nine other facilities which were losing more money than the Wichita facility but remained open. Respondent admitted that this facility had been opened for only 2 years and was still considered a startup operation. There is no evidence to show that Respondent ever changed its belief in the potential of this facility. In fact, the facility has shown a net profit in each of the last 5 months, prior to its closing. The evidence does not show that absent the union activities, the facility would have been closed and the work subcontracted. Rather, Churchill offered the employees a deal. The employees could withdraw their union cards and continue working or they could not back down and Respondent would close the facility.

Most important, the statements of Respondent's managers expose Respondent's feeble defense. Churchill's statements at the employee meeting and to Newman privately, clearly show that the employees could have continued to work had they been willing to abandon their union activities. Further, Milam did not give legitimate business reasons to Respondent's customers. Rather, Milam admitted to Stras, Dixon and Helton that the employees were terminated because they sought union representation.

The issue is not the reasonableness of Respondent's decision or whether operation as an agent run terminal is more financially advisable. Rather, the issue is whether Respondent was motivated by a desire to discourage employees' union activities. As indicated above, the General Counsel has established a strong prima facie case that Respondent closed its Wichita terminal and dismissed the four drivers in response to the filing of the representation petition. Clearly, Respondent has failed to establish that it would have taken the same action in the absence of the employees' protected activities.

2. The independent violations of Section 8(a)(1)

The uncontradicted testimony of Newman establishes that on June 16, Milam questioned him about the employees' union activities. These questions were followed with threats that Respondent would not let the employees organize and would close the business if the employees continued to seek union authorization. Again on June 20, Milam questioned Newman as to whether the employees were going to withdraw their union authorization cards. When Newman indicated that the employees would not withdraw their cards but would continue to pursue union representation, Milam repeated the threat that the terminal would be closed. Accordingly, I find that Respondent coercively interrogated Newman in violation of Section 8(a)(1) of the Act. *Cooke's Crating*, 289 NLRB 1100, 1102 (1988); *Carpenter Trucking*, 274 NLRB 300 (1985).

I have also credited the four drivers' testimony that Churchill threatened that if the employees did not withdraw their union authorization cards, Respondent would close the Wichita terminal. I further credit Newman's testimony that Churchill privately threatened that the facility would be closed, if the employees did not abandon their union activities. Accordingly, I find that Respondent through Milam and Churchill unlawfully threatened that Respondent would close its Wichita terminal if the employees did not withdraw or abandon their support of the Union.

3. The bargaining order

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the leading case on remedial bargaining orders, the United States Supreme Court held:

(1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.

(2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.

(3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is ''slight,'' a bargaining order may issue.

(4) Minor or less-extensive unfair labor practices that have only a minimal effect on election machinery will not support a bargaining order.

As a precondition to a bargaining order, the Board currently requires a showing that the Union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984). In the instant case, it is uncontested that the Union obtained valid union authorization cards from four employees in a bargaining unit of five employees by June 13.

Here Respondent's reaction to the Union's petition and demand for recognition was to immediately threaten closure of the facility and loss of employment if the employees did not withdraw their union authorization cards and abandon their efforts for union representation. When the employees did not accede to Respondent's wishes, Respondent administered its threats and began moving equipment out of its facility and to that of PCS. All of this took place within 2 days of receiving the representation petition.

In *White Plains Lincoln Mercury*, 288 NLRB 1133, 1139–1140 (1988), the Board discussed the application of the *Gissel* test, as follows:

> Because of the nature, extent, and severity of the Respondent's unlawful conduct in response to its employees' organizational activities . . . we shall require that the Respondent recognize and bargain with the Union. Respondent's unlawful discharge of five employees . . . in immediate retaliation against their card signing, is among the ''less remediable'' of unfair labor practices. Loss of employment, frequently referred to as the ''capital punishment'' of the workplace, has long been recognized as the type of action which will have a long-lasting coercive impact on the workforce and demonstrate most sharply the power of the employer over the employees.
>
> Given the small size of the Respondent's operation and the swift and massive layoffs of employees who had signed cards supporting the Union, the Respondent's actions have a pervasive and lasting impact.
>
> The Respondent did not stop with the discharges, however, but reemphasized its antiunion stance in discussions with the discharged employees in which various threats, including threats to close the business, were repeated on several occasions. Threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain. See, e.g., *Milgo Industrial*, 203 NLRB 1196, 1200–1201 (1973), affd. mem. 497 F.2d 919 (2d Cir. 1974); *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980); *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980).

Here, Respondent, the day after the filing of the petition engaged in the hallmark violation of threatening to close the terminal, if the employees did not withdraw their union support. The very next day, when the employees did not yield to the threats, Respondent retaliated against the employees by closing the terminal and dismissing the four employees who had engaged in protected conduct. Respondent, through Churchill made clear to Newman why the terminal had been closed. I find, in light of the violations' seriousness and pervasiveness, the unit's size, the substantial percentage of unit employees the Respondent's threats and discrimination directly affected, and the strong possibility of repetition of similar unfair labor practices, that the unfair labor practices involved in this case would tend to undermine the Union's majority status and impede the election process. I cannot envision a stronger case for the imposition of a *Gissel* bargaining order.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

When an employer has curtailed operations and discharged employees for discriminatory reasons, the Board's usual practice is to order a return to the status quo ante—that is, to require the employer to reinstate the employees and restore the operations as they existed before the discrimination—unless the employer can show that such a remedy would be ''unduly burdensome.'' For the following reasons I find that Respondent has not shown that restoration of its Wichita terminal and reinstatement of its four local drivers would be unduly burdensome.

Respondent moved its equipment out of the Wichita terminal, except for its computer, in one weekend. There is no evidence to suggest that Respondent could not move the equipment back into the facility just as quickly. Respondent's contract with PCS is terminable upon 30 days' notice by either party. Respondent produced no evidence to establish that any capital investment is required. The building has almost 2 years remaining on the lease and has not been converted to any other use. No changes have been made to the building other than to lock the doors. None of the equipment has been sold. Equipment was moved to PCS's facility or other terminals operated by Respondent. Thus, Respondent has not shown that restoration of the operations would require substantial capital investment. In fact, Respondent has not shown that any capital investment is required to reopen the facility.

Respondent contends that it should not be ordered to incur a net operating loss by reopening when it is operating profitably as an agent-run operation. However, it was Respondent, and not General Counsel or the Union, that made a legitimate business decision to exercise its option to renew the lease of the Wichita terminal only a few months before the illegal closing. Respondent knew at that time that the terminal had a net operating loss of over $9000 for the preceding fiscal year, but, Respondent apparently believed that the terminal had the potential to make a profit or grow in the future. Respondent also knew that the facility had shown a profit in each of the last 5 months of its operation. Ordering the Respondent to reopen the terminal is merely ordering it to do what Respondent's management, presumably acting in its own best interests, chose to do, absent unlawful considerations, only a month before the unfair labor practices. A basic principal of law is that the wrongdoer should not profit from his own wrong. Respondent has not shown why that equitable principal should not apply here. In sum, I find that Respondent has not shown that restoration of the Wichita terminal and reinstatement of the four drivers would be unduly

burdensome. Accordingly, I shall recommend that Respondent be ordered to restore its Wichita operation as it existed as of June 16, 1997, unless it can show in compliance proceedings, on the basis of evidence that was not available at the unfair labor practice hearing, that such action would be unduly burdensome. *We Can, Inc.*, 315 NLRB 170, 175 (1994).

I shall recommend that Respondent offer Edward Newman, Glen Tucker, Steve Hoelscher, and William Casselman full and immediate reinstatement to the positions they held prior to their unlawful discharges. Further Respondent shall be directed to make the four drivers whole for any and all loss of earnings and other rights, benefits and emoluments of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to its discharge of the four drivers from its files and notify each of the four drivers in writing that this has been done and that the discharges will not be the basis for any adverse action against them in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

Having found that the Respondent engaged in a campaign of unfair labor practices which destroyed the bargaining unit and, therefore, the Union's majority status, it shall be ordered to recognize and bargain on request with the Union as the exclusive bargaining representative of the bargaining unit employees retroactive to June 16, the date of the first unfair labor practices found herein. See *Reno Hilton*, 282 NLRB 819 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening employees with the closing of its terminal or loss of employment for engaging in union activities and interrogating employees about their union activities or union sympathies.

4. Respondent violated Section 8(a)(3) and (1) of the Act by closing its Wichita terminal and discharging employees Edward Newman, Glen Tucker, Steve Hoelscher, and William Casselman because of their union activities.

5. A bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is the only available effective remedy for the unfair labor practices found above.

Based on the above findings of fact and conclusions of law and on the entire record herein, I issue the following recommended[9]

ORDER

The Respondent, Carter & Sons Freightways, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the closing of its facility, discharge, or other reprisals for engaging in union activities.

(b) Interrogating employees about their union activities or union sympathies.

(c) Closing its facility, subcontracting the work, and discharging employees because of its employees' union activities.

(d) In any like or related manner interfering with, restraining or, coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Edward Newman, Glen Tucker, Steve Hoelscher, and William Casselman full reinstatement to the jobs which they held on June 20, 1997, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or any other rights or privileges they would have enjoyed had they not been unlawfully discharged, and restore its Wichita facility to its operation as of June 16, 1997, unless Respondent can show in compliance proceedings, on the basis not available at the unfair labor practices hearing, that those actions would be unduly burdensome.

(b) Make whole Newman, Tucker, Hoelscher, and Casselman for any and all losses incurred as a result of Respondents' unlawful discrimination against them, with interest, as provided in the remedy section of this decision.

(c) On request, recognize and bargain collectively with the Union as the exclusive collective-bargaining representative from June 16, 1997, with respect to its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time city pickup and delivery drivers and road drivers employed by Respondent at its facility located in Wichita, Kansas, but excluding office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Newman, Tucker, Hoelscher, and Casselman in writing that this has been done and that the discharges found unlawful herein will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Regional Director, post at its Wichita, Kansas facility copies of the attached no-

[9] All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by an authorized representative of Respondent, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since June 16, 1997.

(g) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official of Respondent on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''